(1)

Supreme Court, U.S.
FILED

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OSCAR MARTINEZ, as next friend for Melissa Martinez, a minor;
BLASA MARTINEZ, as next friend for Melissa Martinez, a minor
Petitioners

v.

CRYSTAL CITY INDEPENDENT SCHOOL DISTRICT; RODOLFO ESPINOSA; JANIE RAMIREZ; JOSE GILBERTO RAMIREZ

On Petition For Writ of Certiorari
To the United States Court of Appeals
the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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HIPP

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a school teacher, twice convicted of sexual assaulting the same minor student, can be held liable for said assaults and other ongoing illegal acts with his minor student under 42 U.S.C. § 1983.

(2) Whether the Crystal City Independent School District and/or school officials can be held liable for their teacher's ongoing sexual molestation, physical assault and interstate kidnaping of a minor student; when the relationship was known to the perpetrator's supervisor (vice-principal) but was not reported as required by state law.

(3) Whether the deliberate indifference standard is constitutionally inadequate to protect school children who are sexually abused by their teachers and further victimized by administrators whose actions are ineffective to stop the violations.

CERTIFICATE OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

PETITIONERS

Oscar Martinez	Petitioner
Blasa Martinez	Petitioner
Melissa Martinez	Petitioner
Edward L. Piña	Counsel for Petitioner
Alberto Ramon	Co-Counsel for Petitioner
Paul J. Medellin	Co-Counsel for Petitioner

RESPONDENTS

Crystal City Independent School District	Respondent
Jose Gilberto Ramirez	Respondent
Rodolfo Espinosa	Respondent
Janie Ramirez	Respondent
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Oscar Treviño	Respondent

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JURISDICTION

(1) This action was initially filed in the 293rd Judicial District Court of Zavala County, Texas on November 10, 1997, but then removed by the defendants to federal court on November 18, 1997. The lower court had jurisdiction pursuant to 28 U.S.C. § 1331 and 1343 (4) and plaintiffs' claims are cognizable pursuant to 42 U.S.C. § 1983, and 20 U.S.C. § 1681 *et seq.*

(2) Appellate jurisdiction was correctly asserted pursuant to 28 U. S. C. Section 1291 (1993) because the order and judgment appealed from was the final decision of a United States District Court signed on January 13, 2000 pursuant to Rule 3, Federal Rules of Appellate Procedure and plaintiffs filed their timely Notice of Appeal on February 9, 2000.

(3) The Supreme Court has jurisdiction because the United States Court of Appeals for the Fifth Circuit entered its final decision on February 24, 2001 and no rehearing was requested or otherwise obtained. Accordingly, jurisdiction of this Court is conferred under 28 U.S.C. § 1254 (1) and Rule 10.1(a), 28 U.S.C. Rules of the Supreme Court.

(3) Petitioners do not expect a cross petition for writ of certiorari to be filed pursuant to Rule 12.3.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

United States Constitution Amendment I

United States Constitution Amendment IV

United States Constitution Amendment XIV

United States Code, Chapter 42, Section 1983

Texas Family Code Annotated 34.01 - 34.02

STATEMENT OF THE FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

A. Nature of the Case and Disposition Below

1. Oscar Martinez and Blasa Martinez are the parents of Melissa Martinez. [1] They initiated this civil rights action against the Crystal City Independent School District, Superintendent Espinosa, Vice-Principle Janie Ramirez and teacher Jose Ramirez based upon the sexual molestation of Melissa Martinez by her band teacher Jose Ramirez. Melissa was a 14-year-old eight grade student and a virgin when in 1994 Ramirez first raped her and then convinced her not to report the rape and began an illicit relationship with her.

2. The school vice-principal and district superintendent were so deliberately indifferent to the constitutional harm Melissa faced that this teacher was able to rape, sodomize, and molest this child over a sixteen (16) month period and eventually kidnap her and take her out of state for the purpose of continuing this illicit relationship. The Crystal City ISD has a history of indifference to complaints of this type and of non-compliance with state statutes requiring teachers and administrators to report suspected sexual abuse of minors to appropriate law enforcement or Child Protective Service agencies.

3. Jose Ramirez's criminal culpability was established at trial on June 9, 1997 when he pled "Guilty" to the charge of Sexual Assault of a Child in the 38th Judicial

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[1] Melissa was born on September 14, 1980.

District Court, Uvalde County, Texas, Cause No. 96099332CR. [2] He was subsequently charged with related but distinct charges in Hays County, Texas. He pled guilty to these charges also and was sentenced to ten (10) years in prison with a certain portion probated.

4. Suit was timely filed in the United States District Court for the Western District of Texas Del Rio Division. This case was dismissed however, prior to Jose Ramirez filing of his Original Answer or making any other appearance before the court, when the lower court granted Defendant's Motion for Summary Judgment over plaintiffs' opposition and then denied Plaintiffs' Motion to Reconsider on January 13, 2000. Jose Ramirez filed his original answer with the clerk of the court on June 8, 2000.

5. A timely Notice of Appeal was filed on February 9, 2000. The United States Court of Appeals affirmed the District Court's judgment on February 24, 2001.

B. Statement of Uncontroverted Facts Relevant to Issues Presented for Review

6. In 1994 Jose G. Ramirez offered to drive several band students who had transportation problems to their homes after band practice. He manipulated the transportation so that Melissa would be the last student to be driven home. Once Ramirez had Melissa alone in his vehicle, he

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[2] Citations to the record on appeal or deposition cites have been omitted but are contained in the Record on Appeal to the United States Court of Appeals for the Fifth Circuit.

suddenly and without invitation kissed her. She pushed him away and demanded that she be taken home.

7. From this day forward, Ramirez frequently and continuously both during and after school, albeit privately told Melissa that she was "very beautiful" and that he "wanted her," i.e., wanted to become sexually involved with her. Then, in January of 1995, when taking Melissa home after band practice, he took her to a deserted back road, made her take her clothes off and raped her. She was at that time fourteen (14) years of age and a virgin. She did not report this because she felt ashamed and confused and feared her family's reaction and public disclosure. The next time Ramirez drove her home he forced Melissa to perform oral sex on him.

8. In or about March of 1995, Ramirez made arrangements with the band director at his school to cover his absence from school and took Melissa from Crystal City to San Antonio, Texas without parental consent. While in San Antonio, Ramirez sexually molested his student Melissa Martinez. He repeated this trip "six or seven" times that year and molested her each time.

9. Ramirez unlawfully enticed Melissa into "going out" with him on school days, during school hours, as well as after school hours for purposes of having sexual relations with him on nearly a daily basis. Ramirez made Melissa miss school and go to other cities as a pre-text for engaging the child in further sexual relations. On three (3) other occasions, Ramirez transported Melissa to Uvalde, Texas for the purpose of sexually molesting her. On other occasions he took Melissa to Carizo Springs or San Marcos, Texas, and

other places, for these same unlawful purposes.

10. In or about mid-November, 1995, Janie Ramirez required Jose G. Ramirez to end the relationship so Ramirez went to the Martinez home and informed Mr. and Mrs. Martinez that their daughter, who was one of his students in the Eighth Grade band class, had a "school girl crush" on him. He further alleged Melissa had been calling his residence and creating problems for him and his wife. Mr. Ramirez lied to Oscar and Blasa Martinez when he denied having instigated or encouraged Melissa's attention. Ramirez also lied about the nature and extent of his relationship with Melissa.

11. Mr. and Mrs. Martinez confronted Melissa about Ramirez's allegations. Melissa responded that Ramirez had called her at their home, had invited her calls and had provided her with a pager number and cell phone number specifically for her to contact him. She further relayed that Mr. Ramirez had been giving her gifts and telling her that he loved her and would leave his wife for her upon her attaining age of majority.

12. Upon demanding strict proof for her contentions, Melissa provided her parents with the following evidence of Ramirez's improper conduct:

(1) Mickey Mouse watch;
(2) other expensive jewelry;
(3) colored contact lenses;
(4) body lotions;
(5) romantic cards and letters;
(6) Nike sandals; and,
(7) other sundry items.

Melissa informed her parents that she had received each of the above items from her band teacher, Jose Ramirez, and that he had instigated the relationship.

13. Shortly after Melissa made her parents aware of Ramirez's improprieties, Mr. and Mrs. Martinez informed Rodolfo Espinosa, Superintendent of the Crystal City I.S.D. that they suspected that a wholly improper, unlawful sexual relationship existed between Jose Ramirez and their daughter based upon the information that Melissa provided. The Martinez's showed Superintendent Espinosa the numerous expensive, inappropriate gifts Ramirez had given Melissa. After receiving this information district officials did nothing to stop this unlawful, exploitive relationship or to protect the minor child.

14. It was not until January 29, 1996 that Superintendent Espinosa suspended Ramirez (with full pay and benefits). Actually, Jose G. Ramirez was suspended because be stripped and beat his wife (Vice Principal Janie Ramirez) strangled her and left her for dead, naked on a deserted country road and not because of his molestation of Melissa Martinez. *However; even this suspension was insufficient to protect Melissa because even during this suspension, Jose Ramirez continued to sexually molest her.*

15. Even after terminating Ramirez, district officials did absolutely nothing to protect Melissa. Shortly after his termination Ramirez kidnaped with Melissa and took her to numerous cities and other states, including Oklahoma and Colorado for the purpose of continuing his sexual relations with her. During this abduction, he hit Melissa when ever she tried to call her parents. Incredibly, all during this time

Jose Ramirez remained in telephone contact with his vice-principal and spouse, Janie Ramirez.

16. It is not contested by respondents that Melissa was subjected to physical sexual abuse by Ramirez, or that such physical sexual abuse was occasioned both during and after school hours over a period of sixteen (16) months, or that Jose Ramirez twice pled "Guilty" to separate charges of the sexual assault of Melissa in two separate counties. It is also uncontested that as a result of Ramirez's sexual assault of Melissa Martinez, she was deprived of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment.

ARGUMENT AND AUTHORITIES

A. Issue Number 1 - Whether a school teacher, twice convicted of sexual assaulting the same minor student, can be held liable for said assaults and other ongoing illegal acts with his minor student.

17. The case law holds that physical sexual abuse of a student by a school teacher can give rise to Section 1983 liability. The Fifth Circuit has also held, that "bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the fourteenth amendment. Obviously, there is never any justification for sexually molesting a schoolchild, and thus, [there is] no state interest... which might support it." *Doe v. Taylor ISD*, 15 F.3rd 443, 451– 452 (5th Cir., 1994); *See Also Jefferson v. Ysleta Independent School District*, 817 F.2d 303, 305 (5th Cir.1987) (a case involving a violation of a schoolchild's substantive due process rights by a teacher); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir.1981) (The right to be free of state- occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process).

18. It is a matter of record that Ramirez pled guilty to two separate criminal charges of sexual assault of a child, i.e. Melissa Martinez at different times and in different counties, and that he was sentenced to 10 years probation and a fine of $5,000.00. Defendants do not contest that Ramirez sexually assaulted Melissa. Accordingly, Ramirez

violated Melissa's substantive due process rights as a matter of law and he is liable under 42 U.S.C. § 1983 for his acts depriving Melissa of her constitutional rights. *See Doe v. Taylor ISD* at 458. Therefore, the lower court erred when it ***sua sponte*** dismissed plaintiffs' 42 U.S.C. § 1983 claims against Jose Ramirez in his official capacity.

B. Issue Number 2 - Whether the Crystal City Independent School District and/or school officials can be held liable for their teacher's ongoing sexual molestation, physical assault and interstate kidnaping of a minor student; when the relationship was known to the perpetrator's supervisor (vice-principal) but was not reported as required by state law.

1) As to Janie Ramirez's Grant of Qualified Immunity

19. Vice-Principal Janie Ramirez is not entitled to qualified immunity in her official capacity under the *Doe v. Taylor ISD*'s three prong test for personal liability of school officials and her knowledge and conduct of Jose Ramirez's egregious acts with a student must be imputed to superintendent Rodolfo Espinosa in his official capacity.

a.) The First Prong Is Satisfied Because Vice-principal Janie Ramirez Learned of Facts or a Pattern of Inappropriate Behavior by a Subordinate Pointing Plainly Toward the Conclusion That the Subordinate Was Sexually Abusing the Student Evidenced by Five (5) Separate Confrontations.

20. Janie Ramirez was personally involved in at least five (5) confrontations involving Melissa. These confrontations regarded her husband's improper relationship with Melissa. The court below imprudently mischaracterized these confrontations as mere "catfights." Two (2) such confrontations occurred at school, one (1) outside the Ramirez home and two (2) took place ***inside the Ramirez home***.

21. At one such school confrontation Vice-Principal Janie Ramirez admitted to knowledge of inappropriate behavior at least one school year preceding Oscar Martinez's November 1995 report to Superintendent Espinosa of suspected sexual molestation of Melissa. Janie Ramirez confronted Joe Ramirez on school grounds about his improper relationship with Melissa and said "Why are you with this little girl?"

22. Regarding the confrontations at the Ramirez home. The first in home confrontation occurred prior to Oscar Martinez's November, 1995 meeting with Superintendent Espinosa; Janie Ramirez picked up Melissa after school and drove Melissa to Janie Ramirez's home. Where the Vice-Principal asked Melissa about this improper relationship, the gifts, that Joe Ramirez had said "he loved [Melissa] and that he was going to leave her", that Ramirez had taken her out of town in the past.

23. The second in home confrontation, took place after the November, 1995 meeting, when Vice-Principal Ramirez went home to check on her teacher/husband's absence from school. Earlier that day, Ramirez had represented to school officials that he could not go into work that

day. Rather than convalescing at home; Ramirez picked up Melissa in his truck and took her to the Ramirez home for the purpose of taking her to San Antonio so as to engage in sexual relations with Melissa. Vice-Principal Ramirez decided to check on her husband at home. Upon arriving Vice-Principal Ramirez found both her husband and her minor female student, Melissa, together alone in her home. Ramirez was less than fully dressed, shaving preparing to take Melissa to San Antonio. Vice-Principal Ramirez argued with Melissa and called the student a "fucking bitch" and she also tried to hit Melissa. Given these facts, a reasonable trier of fact could have easily concluded that Janie Ramirez knew or should have known her husband/subordinate was engaged in inappropriate behavior with this 14-year-old student.

24. The confrontation outside the Ramirez home took place before the November 1995 meeting and was improperly characterized by the court below as a mere "catfight" where Janie Ramirez told Espinosa that she suspected an improper relationship and that she felt jealous. This characterization is outrageous because it assumes that a minor student has the same level of maturity and responsibilities and duties under the law as does a school vice principal and nothing could be further from the truth.

25. Accordingly, there is credible evidence from both plaintiffs and defendants depositions that Janie Ramirez knew of facts or a pattern of inappropriate behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student.

b.) The Second Prong Is Satisfied Because Vice-Princi-

pal Ramirez Demonstrated Deliberate Indifference Toward the Constitutional Rights of Melissa Martinez by Failing to Take Action That Was Statutorily Required And Also Necessary to Prevent or Stop the Abuse Following Any of the Five (5) Confrontations She Had Discussed Above.

26. This is especially true when Vice-Principal Ramirez found Melissa in her home, during school hours, with her husband/subordinate. Janie Ramirez was required to report this incident to her principal and was statutorily required to notify appropriate law enforcement authorities or to Child Protective Services of this suspect behavior with this child within 48 hours so that an investigation could begin. *See* Tex. Fam. Code Ann. 34.01-34.02. She failed to do this on at least five separate occasions. It is incontrovertible that Vice-Principal Ramirez failed in her duty to protect the child, discipline the employee, or report this misconduct to her superior or to Child Protective Services.

27. Instead she engaged in name calling and cursing Melissa which by her own testimony would have lead anyone to believe that child sexual abuse was occurring. She also concealed this evidence from her superiors who had a right to know what was occurring or what she suspected. Vice - Principal Ramirez in a report made to Superintendent Espinosa stated that she felt jealous of Melissa and said "***...I suspect, but I can't prove and I don't want to believe.***" Her suspicions of an improper relationship triggering feelings of jealousy, regardless of whether she wanted to believe them, also triggered her duty to personally report her suspicions

within 48 hours to the Texas Department of Protective and Regulatory Services her suspicions. She was required by law to report such suspicion to the appropriate state or local law enforcement agencies; this was a duty which she wholly failed to honor, instead she excused her failure to act by rationalizing that she "act[ed] like a little girl [herself]." She assumed the role of a jealous wife rather than a prudent, responsible, reasonable state public school vice-principal and failed to discharge any of her supervisory duties and official obligations.

28. The Fifth Circuit held in *Doe v. Rains* that "a breach of a state law duty to report [can] render a person liable under 1983 as a responsible state actor [if] that person also has a duty under state law to exercise state authority in controlling the events that produced the unreported injury." *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1414 -1416 (5th Cir.1995). As Ramirez's Vice-Principle, Janie Ramirez possessed the requisite state authority of control over Jose Ramirez and of his activities with regards to his students. Vice-Principal Janie Ramirez failed to act in a manner consistent with that of a reasonable and prudent school administrator. Accordingly, when she failed to report within 48 hours her suspicions and knowledge she was in breach of her duty to report. She failed to take these minimal yet mandatory steps because the teacher was her husband. This is credible evidence of and a reasonable trier of fact could find that Janie Ramirez exhibited deliberate indifference towards Melissa's constitutional right to bodily integrity.

29. Assuming in arguendo that Vice-Principal Ramirez could claim some sort of spousal privilege for not reporting her suspicions and/or knowledge of her husband's improper conduct to the appropriate legal authorities, this still does not relieve her of her duty to protect Melissa. Moreover, this spousal privilege argument was never raised below and should not be considered on appeal. *Id.*

c.) The Final Prong Is Satisfied by Vice-principal Ramirez's Failure to Take Action Which Caused the Constitutional Injury to the Student.

30. It is plainly evident that but for the failure of Vice-Principal Ramirez to report her suspicions of her husband's improper relations with 14-year-old Melissa Martinez to the appropriate authorities following any of the five (5) confrontations; Melissa would not have been raped, sodomized and assaulted by Jose Ramirez for so long. Not only did Vice-Principal Ramirez fail to act to safeguard this child but she engaged in a cover up of her husband's criminal acts thus allowing him to continue his ongoing predatory behavior which culminated in the kidnaping of Melissa. Therefore, the third prong of the test is met and Vice-Principal Janie Ramirez in her official capacity is not entitled to qualified immunity under the three prong test set forth in *Doe v. Taylor ISD*.

2. <u>As to Rodolfo Espinosa's Grant of Qualified Immunity</u>

31. Superintendent Rodolfo Espinosa in his official capacity is not entitled to qualified immunity under the *Doe V. Taylor ISD*'s three prong test for personal liability of school officials and/or in the alternative, his knowledge and conduct overcomes his qualified immunity defense.

a.) The First Prong Is Satisfied Because Superintendent Espinosa Learned of Facts or a Pattern of Inappropriate Behavior by a Subordinate Pointing Plainly Toward the Conclusion That the Subordinate Was Sexually Abusing The Student Evidenced by Five (5) Separate Reports of Impropriety and Sexual Relations He Received.

32. The school district conceded that Espinosa knew of inappropriate conduct between Jose Ramirez and Melissa on or about November 21, 1995 during his meeting with Oscar Martinez. On January 18, 1996 Espinosa received a second written report from J. C. Maldonado, that on January 16, 1996 Melissa, in front of the entire class, was publicly identified by R. S. (a student and relative of Janie Ramirez) as "Blower" and that Joe Ramirez was going out with Melissa. In addition that J. C. (another student) confirmed they were seeing each other. This information was also reported to Janie Ramirez by Ana Guerra. On January 24, 1996, Espinosa received a third new report from district officer Magge Gonzales, who reported that Blasa Martinez " suspected sexual involvement." Earlier in January Espinosa's daughters (who were students in the

same school as Melissa) reported similar knowledge to him. In the first week of February 1996 Espinosa received a fifth new report from interviews with students Leanor O., Sepulveda, and Gilbert R. reaffirming favoritism, confrontations between Mrs. Ramirez and Melissa, rumors of impropriety, Joe Ramirez calling Melissa and sighting of the two at other locations. Finally, Espinosa admitted knowledge of the sexual encounters between Ramirez and Melissa during the summer of 1996 and that Ramirez had kidnaped Melissa and taken her to Colorado. Evidence of Espinosa's knowledge of this pattern of inappropriate behavior and sexual assault is sufficient to show the first prong of the test is met.

b.) The Second Prong of the Doe Test Is Satisfied Because Appellants Can Demonstrate That Superintendent Rodolfo Espinosa Was Deliberately Indifferent to Melissa Martinez's Constitutional Right to Her Bodily Integrity When He Failed to Prevent or Stop a Teacher from Continuing to Seduce, Rape, Sodomize, Molest, Assault and Kidnap this Child Student.

33. The trial court's order granting summary judgment was based upon the extremely strained premise that Espinosa was not consciously indifferent to the constitutional rights of Melissa Martinez when after receiving the first report of suspected impropriety from Oscar Martinez in November, 1995 he contacted Child Protective Services and informed them of Oscar Martinez's report. However, Espinosa received five (5) subsequent new reports from

completely different sources. Espinosa characterized such reports as "hearsay" as his basis for not taking substantive action based on the reports. Espinosa was bound by law to the same extent and under the same legal theories as Vice-Principal Janie Ramirez. Accordingly, Espinosa is also liable in his official capacity under the legal theory of *Doe v. Rains* regarding a supervisor's liability for failure to notify appropriate law enforcement authorities or Child Protective Services of suspect behavior with a child within 48 hours so that an investigation into possible sexual molestation of a child is initiated. *See* Tex. Fam. Code Ann. 34.01-34.02. The State of Texas does not provide Superintendents any "safe harbor" from complying with this statutory duty. There is no provision in either state statute or case law which grants a Superintendent discretion as to which reports of suspected sexual abuse of a child, by a subordinate state employee under his authority, he need not report within 48 hours. Superintendents must make such reports of each and every report of suspect activity/relationship by a subordinate teacher he receives. The intent of this reporting statute is to insure that a credible, thorough investigation is conducted by an independent state agency trained to conduct this type of investigation; regardless of any internal investigation done by the notifying Superintendent or school district. Superintendent Espinosa also failed in his duty to notify Child Protective Services within 48 hours after receiving the next four (4) reports provided to him following the initial formal complaint by Oscar Martinez in November of 1995. Additionally, it was not until Janie Ramirez pressed charges against her husband, Joe Ramirez for assaulting her, driving

her to a secluded area where he stripped her, strangled her and left her for dead that Superintendent Espinosa recommended to his school board that Ramirez be terminated. This is the action he had previously refused to take after being informed by multiple credible sources of the sexual assaults inflicted upon Melissa Martinez.

34. Espinosa only acted after he was contacted by the Chief of Police and informed that Ramirez was arrested for stripping, strangling and beating his wife and leaving her for dead, naked in the country. This occurred on January 26, 1998. Ramirez was suspended with pay; "On Monday morning, January the 29th, I suspended Mr. Ramirez with pay and decided that I needed to do -- to take the [fraternization] investigation to the next level."

35. Within seven (7) days, interviews finally and completely ***confirmed*** the widely held allegations of impropriety by Ramirez, the occurrence of at least *two* confrontations "cat fights" between Vice-Principal Janie Ramirez and Melissa, and confirmation that Ramirez seduced Melissa. In a matter of one week superintendent Espinosa was able to confirm exactly what Oscar Martinez, what Blasa Martinez and what his two daughters had reported to him in January of 1996.

36. The superintendent consciously and intentionally disregarded Melissa' constitutional rights *by refusing to conduct such investigations upon first report of impropriety by the Martinez's or upon subsequent reports by multiple informants and instead acted only after Ramirez was arrested for stripping and strangling his wife and leaving her unconscious, naked, on a deserted back road.*

37. Most heinous of all perhaps, is the fact that Espinosa dismissed the admitted giving and receiving of gifts between teacher and student based upon teacher's claim that the student had low self-esteem, in effect, blaming Melissa. When in fact this type of activity is direct evidence of sexual harassment of a student by a teacher. The District's *Notice of Parent and Student Rights* (defines "sexual harassment of a student by an employee includes any welcome or unwelcome sexual advances...it also includes...enticing...a student to engage in sexual behavior..." This evidence clearly establishes that Rodolfo Espinosa is not entitled to qualified immunity on account of his deliberate difference to Melissa's constitutional right to her bodily integrity.

c.) The Final Prong Is Satisfied by Superintendent Espinosa's Failure to Take Action Which Caused the Constitutional Injury to the Student.

38. It is plainly evident that but for the failure of Espinosa to act on all five (5) reports detailed above of improper relations with 14-year-old Melissa Martinez to the appropriate authorities; Melissa would not have been raped, sodomized and assaulted by Jose Ramirez for so long thus allowing him to continue his ongoing predatory behavior. Therefore, the third prong of the test is met and Espinosa in his official capacity is not entitled to qualified immunity under the three prong test set forth in *Doe v. Taylor ISD* for personal liability of school officials.

C. Issue Number 3 - Whether the deliberate indifference standard is constitutionally inadequate to protect school children who are sexually abused by their teachers and further victimized by administrators whose actions are ineffective to stop the violations.

1 Petitioners can establish a persistent, widespread practice of officials or employees which is so common and well-settled as to constitute a custom that fairly represents a policy of conscious indifference to male teachers seducing and/or having sexual relations with female students.

39. Crystal City ISD implicitly allowed Melissa's continued sexual abuse by failing to formally reprimand Jose Ramirez, until motivated by the egregious violence against his wife. Even so, he continued to sexually molest Melissa both during his suspension and after termination.

40. The custom of adult instructors carrying on sexual relations with students was common in the Crystal City Independent School District. *The list of teachers who carried on improper relations with students starts with Superintendent Espinosa himself who married a student two months after she graduated.* In point of fact, Espinosa testified to his knowledge of four other incidents of inappropriate relationships between minors and instructors in the Crystal City School District. The first involved Adolfo Guzman, a prior band director. Second, there was Mr. Alejandro Sanchez, a teacher at Crystal City High School. Third, there was Mr. Joe de la Rosa at Zavala

Elementary School. Fourth, Mr. Ozuna was also identified.

41. The evidence adduced by the Plaintiff and set forth above illustrates "[a] persistent, wide spread practice of [district] officials or employees which, although not authorized by officially adopted and promulgate policy, is so common and well settled as to constitute a custom that fairly represents [district] policy." *Eugene v. Alief Independent School District*, 65 F.2d 1299, 1304 (5th Cir. 1995), *cert denied*, 517 U.S. 1191 (1996).

2 Petitioners can establish this custom of conscious indifference was a proximate cause of the constitutional injury suffered by Melissa.

42. The district's ongoing pattern of failure to act in accordance with their duty of care owed to students under their control for over a decade was a major contributing factor leading directly to the harm suffered by Melissa. Jose Ramirez was emboldened by the well-established practice of supervisor's condoning improper relations with students evidenced by the failures to report suspicions of impropriety, failure to investigate and failure to timely discipline responsible teachers and supervisors. Accordingly, a jury could find that school officials failed to use "many courses of action open to a school official that [could] negate deliberate indifference" and therefore summary judgement is not warranted given these facts to any defendant on account of qualified immunity. *Doe v. Taylor ISD* at 457 FN12.

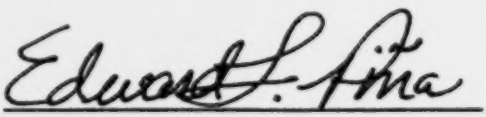
REASONS FOR GRANTING WRIT

43. The deliberate indifference standard is constitutionally inadequate because its focus is misplaced. The standard focuses on the protection of school districts instead of on protecting school children. If the facts of this case do not trigger school district liability then there are virtually no facts that will ever trigger liability. This is tantamount to absolute immunity and with absolute immunity comes corruption and abuse.

44. Melissa's plight makes it painfully clear that a new standard must be set forth by this Court. A standard that imposes on school officials an affirmative duty to protect a child upon receipt of a non-frivolous report of suspected sexual abuse of school children by school personnel. The need for such a standard is clear because school officials act ***in loco parentis***, they are the child's parent during the school day. Parents always have a duty and obligation to protect their children and the courts hold them accountable when they do not. Similarly, this Court is requested to fashion a new standard that encourages public accountability to protect a school child from actual physical harm attendant to sexual abuse by a school official and to protect the school child's constitutional right to their bodily integrity. Victims need a meaningful avenue of redress when school authorities exacerbate the injuries to a child by failing to take swift, appropriate and effective remedial action which does in fact protect the child and end their sexual abuse.

WHEREFORE, PREMISES CONSIDERED, petitioners, Oscar Martinez, Blasa Martinez and Melissa Martinez pray that the Court thoroughly consider this Petition for Writ of Certiorari, as well as the status of the legal precedents, then grant the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and order briefing of the issues and argument in this case.

Respectfully Submitted,



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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00–50142
Summary Calendar

U.S. COURT OF APPEALS
FILED
FEB 23 2001
CHARLES R. FULBERG III
CLERK

FILED
2110 MAR 21 P 2:33
CLERK, U.S. DIST. COURT
WESTERN DIST. OF TEXAS
BY /BJ
DEPUTY

OSCAR MARTINEZ, as next friend for Melissa Martinez, a minor; BLASA MARTINEZ, as next friend for Melissa Martinez, a minor,

Plaintiffs-Appellants

v.

CRYSTAL CITY INDEPENDENT SCHOOL DISTRICT; ET AL

Defendants

CRYSTAL CITY INDEPENDENT SCHOOL DIS-

APPENDIX 1

TRICT;
RODOLFO ESPINOSA; JANIE RAMIREZ;
JOSE GILBERTO RAMIREZ

Defendants – Appellees

Appeal from the United States District Court
for the Western District of Texas, Del Rio

Before DAVIS, JONES and DeMOSS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

It is FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: MAR 19 2001

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit
By /s/ Larry Gegenheimer. Jr.
Deputy
New Orleans, Louisiana
MAR 19 2001

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00–50142
Summary Calendar

U.S. COURT OF APPEALS
FILED
FEB 23 2001
CHARLES R. FULBERG III
CLERK

OSCAR MARTINEZ, as next friend for Melissa Martinez, a minor; BLASA MARTINEZ, as next friend for Melissa Martinez, a minor,

Plaintiffs-Appellants,

versus

CRYSTAL CITY INDEPENDENT SCHOOL DISTRICT; ET AL,

Defendants

CRYSTAL CITY INDEPENDENT SCHOOL DISTRICT, RODOLFO ESPINOSA; JANIE RAMIREZ, JOSE GILBERTO RAMIREZ,

Defendants – Appellees.

Appeal from the United States District Court

APPENDIX 3

for the Western District of Texas
USDC No. DR-97-CV-83-1

Before DAVIS, JONES and DeMOSS, Circuit Judges.

PER CURIAM:*

Plaintiffs Oscar and Blasa Martinez, as next friends for their minor daughter Melissa (hereinafter "plaintiffs"), appeal from the district court's dismissal of certain official capacity claims and its grant of summary judgment to defendants Espinosa and Crystal City Independent School District ("CCISD") in this 42

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.54.

U.S.C. § 1983 suit arising from an improper relationship between Melissa and Jose Gilberto Ramirez, her teacher. After a de novo review of the record, we affirm.

The plaintiff's first argue that the district court erred by dismissing sua sponte the official capacity claims against Jose Gilberto Ramirez as redundant of claims against the

school district. The plaintiffs did not mention in their notice of appeal the district court's adoption of the magistrate judge's recommendation to dismiss these claims, nor did they argue this issue in their motion for reconsideration. Even though notices of appeal are to be liberally construed, appellate jurisdiction peers lacking over this issue. See Fed. R. App. P. 3 (c); Capital Parks, Inc. v. Southeastern Adver. and Sales Sys. Inc., 30 F.3d 627, 630 (5th Cir. 1994); Lockett v. Anderson, 230 F.3d 695, 700 (5th Cir. 2000). Further, because the plaintiffs did not object to the magistrate judge's recommendation, our review would be limited to plain error, and we do not find such error here. See Douglas v. United Services Automobile Ass'n, 79 F. 3d 1415, 1430 (5th Cir. 1996) (en banc); Kentucky v. Graham, 473 U. S. 159, 165 (1985).

Plaintiffs next argue that the district court erred in dismissing the official capacity claims against Janie Ramirez. Because plaintiffs raised this claim in their motion for reconsideration and noticed that decision in their notice of appeal, we liberally construe the notice of appeal to find appellate jurisdiction. Nevertheless, we find no plain error in the District Court's adoption of the magistrate judge's

recommendation to dismiss these claims. Douglass, 79 F. 3d at 1430; Graham, 473 U.S. at 165.

APPENDIX 5

Plaintiffs next argue that the District court erred in granting summary judgment to Espinosa based on qualified immunity because his conduct was deliberately indifferent. We find that Espinosa's conduct, although possibly ineffective, did not rise to the level of deliberate indifference toward Melissa's constitutional rights. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 433, 457-58 (5th Cir. 1994) (en banc).

Finally, plaintiffs argue that the district court erred in granting summary judgment to CCISD because of a widespread practice of permitting male teachers to engage in inappropriate conduct with female students. Under Texas law, the school district Board of Trustees is responsible for making district policy. See Gonzalez v. Ysleta Indep. Sch. Dist., 996 F. 2d 745, 752 (5th Cir. 1993). After a careful review of the summary judgment evidence, we find that plaintiffs have failed to show a widespread pattern of improper conduct that was known or tolerated by the public officials responsible for policymaking in the school district. See Bennett v. City of Slidell, 728 F.2d 762,768 (5th Cir. 1984) (en banc); Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984).

Plaintiffs have failed to brief their state law claims against CCISD or Espinosa. Accordingly, those claims are deemed abandonded. See Yohey v. Collins, 1985 F. 2d 222, 225 (5th Cir. 1993).

AFFIRMED.

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Oscar Martinez and	§	FILED
Blasa Martinez,	§	Jan 18 11 33 PM '00
as Next Friends for	§	CLERK, U.S. DIST. COURT
Melissa Martinez,	§	WESTERN DIST. OF TEXAS
a Minor.	§	BY /BJ
Plaintiffs,	§	DEPUTY
	§	
	§	
v.	§	**Civil Action Number:**
	§	**DR-97-CA-083-FB**
	§	
Crystal City Independent	§	
School District, Jose	§	
Gilberto Ramirez, Rodolfo	§	
Espinosa, Manuel Lozano,	§	
Janie Ramirez,	§	
Defendants.	§	

[DATE OF ENTRY 13TH DAY OF JANUARY , 2000]

ORDER CONCERNING MOTION TO RECONSIDER AND MOTION FOR ENTRY OF FINAL JUDGMENT

Before the Court is Plaintiffs' Motion to Reconsider

Opinion and Order filed November 12, 1999 (docket #72), to which the defendants have responded, and Defendants' Motion for Entry of Final Judgment filed November 19, 1999 (docket #74), by defendants Crystal City Independent School District, Rudolfo Espinoza, and Janie Ramirez for entry of final judgment to which no response has been received. After reviewing these motions and the relevant law, the Court finds the motion to reconsider opinion and orders should be denied and defendants' motion for entry of final judgment should be granted.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion to Reconsider Opinion and Order (docket #72) is DENIED.

1

The Court finds that the elements of the claims asserted by the plaintiffs against defendants Crystal City Independent School District, Rudolfo Espinoza, and Janie Ramirez are distinct from those claims remaining against defendant Jose Gilberto Ramirez in his individual capacity. The Court further finds that the affirmative defenses asserted by defendants Crystal City Independent School District, Rudolfo Espinoza, and Janie Ramirez are distinct from those defenses asserted by defendant Jose Gilberto Ramirez.

There being no just reason to delay entry of a final judgment in this case, IT IS HEREBY ORDERED that Defendants' Motion for Entry of Final Judgment (docket

#74) is GRANTED. IT IS FURTHER ORDERED that plaintiffs' claims against defendant Jose Gilberto Ramirez in his individual capacity are HEREBY SEVERED from the plaintiffs' claims against defendants Crystal City Independent School District, Rudolfo Espinoza, and Janie Ramirez in the above styled action, that plaintiffs take nothing on their claims against Crystal City Independent School District, Rudolfo Espinoza, and Janie Ramirez, and JUDGMENT IS HEREBY ENTERED IN FAVOR OF THE DEFENDANTS CRYSTAL CITY INDEPENDENT SCHOOL DISTRICT, RUDOLFO ESPINOZA, and JANIE RAMIREZ, pursuant to this Court's Memorandum and Order signed on September 22, 1999.

It is so ORDERED.

SIGNED this 13th day of January , 2000.

/s/ FRED BIERY
FRED BIERY
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 22 2001
CLERK

No. 00-1750

IN THE

Supreme Court of the United States

OSCAR MARTINEZ, as next friend for Melissa Martinez, a minor, and BLASA MARTINEZ, as next friend for Melissa Martinez, a minor,

Petitioners,

v.

CRYSTAL CITY INDEPENDENT SCHOOL DISTRICT, RODOLFO ESPINOSA, JANIE RAMIREZ and JOSE GILBERTO RAMIREZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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JUN 22 2001
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I

REASONS FOR DENYING THE WRIT

The Court of Appeals properly affirmed the dismissal of Petitioners' claims against Jose Gilberto Ramirez in his official capacity.

The Court of Appeals properly affirmed the dismissal of the official capacity claims against Janie Ramirez and Rodolfo Espinosa.

The Court of Appeals properly affirmed summary judgment in favor of Crystal City Independent School District.

The United States Court of Appeals has *not* entered a decision in conflict with the decision of another United States Court of Appeals in this matter; it has *not* decided an important federal question in a way that conflicts with a decision of the Supreme Court of Texas; it has *not* so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. Rule 10(a), 28 U.S.C. Rules of the Supreme Court. In fact, it has followed clearly established laws and standards which are adequate to protect school children's constitutional rights.

STATEMENT OF THE CASE

A. Nature of Case and Disposition Below.

Petitioners Oscar Martinez and Blasa Martinez, as next friends of their daughter Melissa Martinez brought suit against the Crystal City Independent School District,

Superintendent Rodolfo Espinosa; Vice-Principal Janie Ramirez; Manual Lozano, Principal at Fly Junior High School, and Jose Gilberto Ramirez, alleging wrongful conduct on the part of defendants arising from an alleged sexual relationship between Melissa Martinez and her former teacher, Jose Gilberto Ramirez while she was a student of Crystal City Independent School District in the 1995-1996 school year (2 R 223).[1]

Petitioners sued Crystal City Independent School District and Rodolfo Espinosa, in his official and individual capacity; Manual Lozano, in his official and individual capacity; Janie Ramirez, Vice-Principal of Fly Junior High School, in her official capacity; and Jose Gilberto Ramirez in his official and individual capacity (2 R 223). Manual Lozano was subsequently dismissed from the lawsuit (2 R 220). Petitioners alleged violations of Melissa Martinez' constitutional right to "bodily integrity" under 42 U.S.C. § 1983, as well as tort claims of negligence and intentional infliction of emotional distress (2 R 223).

Respondents, as Defendants below, moved for summary judgment on the Martinez' claims, which the district court granted on September 22, 1999, as to Crystal City I.S.D. (4 R 787). On that same date, the district court signed an Order Accepting Report and Recommendation of United States Magistrate Judge, dismissing Petitioners' claims against Rodolfo Espinosa, Janie Ramirez and Jose Gilberto Ramirez in their official capacities (4 R 802). On January 13, 2000 the district court denied Petitioner's Motion to

---

1. References to the Record on Appeal are designated by the number of the record volume assigned by the Clerk of the Court of Appeals followed by "R" and the pertinent page number(s).

Reconsider (4 R 847). Final Judgment was granted on that date severing Petitioners' claims against Jose Gilberto Ramirez (4 R 849). Jose Gilberto Ramirez was not a party to the motion for summary judgment and is not a party to the appeal. He did not file an answer herein until June 8, 2000 (4 R 875).

The United States Court of Appeals affirmed the district court on February 24, 2001.

B. Statement of Facts.

On or about November 21, 1995, Oscar Martinez, Plaintiff Melissa Martinez's father, and Police Chief Contreras met with Superintendent Espinosa in Espinosa's office (2 R 271-272, 290). During the meeting, they discussed Oscar Martinez's concerns that: (1) the teacher/band director Jose Gilberto Ramirez had given gifts to Plaintiff Melissa Martinez which Oscar Martinez considered inappropriate; and (2) that the teacher/band director had told Plaintiff Melissa Martinez that he wanted to marry her when she turned 18 years old (2 R 271-272, 290). Oscar Martinez informed Espinosa that he did not believe there was a sexual relationship between his daughter and the teacher, but he was concerned about the gifts and the statement (2 R 272).

On that same day, on or about November 21, 1995, Superintendent Espinosa:

— Advised Oscar Martinez that he would look into the matter. He immediately began an investigation by talking to the Ramirez' supervisors and other school district employees (2 R 272, 290, 293, 294-295).

— Called and spoke to Greg Cortez at Child Protective Services to report Oscar Martinez's concerns (2 R 272).

— Agreed with Police Chief Luis Contreras that the Crystal City Police Department would conduct an investigation (2 R 272, 290, 293).

— Held a conference with Ramirez and his supervisor, Jesse Maldonado, to discuss Oscar Martinez's concerns and obtain a response from the teacher. During the conference, Ramirez denied an inappropriate relationship between him and the student, and explained that the gifts were given to the student as a motivational tool. Superintendent Espinosa then gave directives to Ramirez to cease giving gifts to Melissa Martinez, to not be alone with her, to limit his contact with her to that which was absolutely necessary, and to avoid any conduct or contact with her that could be perceived as inappropriate (2 R 272, 300).

— Held separate conferences with the Ramirez' supervisors, Jesse Maldonado and Jorge Ybarra, as well as with High School Counselor Carmen Gallegos, to advise them of Oscar Martinez's concerns, to find out if they had heard of or seen an inappropriate conduct between the teacher and the student, to inform them of the directives given to the teacher, and to direct them to immediately report to him if they saw or heard of any inappropriate conduct. Mr. Maldonado, Mr. Ybarra, and Ms. Gallegos all denied having witnessed or heard of any improper conduct between Plaintiff Melissa Martinez and the teacher (2 R 273, 300, 302-303).

— Directed Counselor Gallegos to counsel with the student and also make arrangements for Maria C. Cruz, a private clinical psychologist, to visit with the student at the school district's expense (2 R 273, 303, 306-307).

After the above steps were taken, Superintendent Espinosa began hearing more rumors in January of 1996, concerning Jose Gilberto Ramirez and Melissa Martinez (2 R 273). As a result of this, Espinosa took the following action:

— Held additional conferences with the teacher and reiterated his earlier directives. The teacher continued to deny any inappropriate conduct with the student (2 R 274).

— Advised Oscar Martinez of the steps that the school district was taking as well as the results of the school district's investigation (2 R 291, 296-297).

— Met with Police Chief Contreras regarding the status of the Crystal City Police Department's investigation and learned that the Crystal City Police Department's investigation into inappropriate conduct on the teacher's part was inconclusive (2 R 274, 291).

— Suspended the teacher on January 29, 1996, pending a full administrative investigation, just 34 school days after his initial meeting with Oscar Martinez (2 R 274, 278).

— On February 1, 1996, issued directives to High School Principal Dr. John Fiol, Junior High School

Principal Jesse Maldonado, and Band Director George Ybarra to investigate the rumors of fraternization between the teacher and the student, and to specifically investigate the report of the student receiving gifts from the teacher, as well as rumors of the student receiving car rides from the teacher and the teacher paying excessive attention to the student as well as two verbal confrontations between Martinez and Janie Ramirez. They were directed to submit their reports to Superintendent Espinosa by no later than February 8, 1996 (2 R 275, 279).

— On February 8, 1997, Dr. Fiol reported to Superintendent Espinosa that his investigation showed that fraternization had occurred and inappropriate comments had been made to the student. Jesse Maldonado also reported to Espinosa that his interviews of students revealed that the students were only aware of the rumors, but not of any facts to substantiate the rumors. This administrative investigation was inconclusive as to the existence of a sexual relationship between the teacher and the student (2 R 275, 281, 301).

— On or about February 11, 1996, Superintendent Espinosa retained legal counsel on behalf of the school district to conduct another investigation and to advise the school district on the matter (2 R 275).

— The teacher Ramirez and the student Melissa Martinez continued to deny the existence of any improper conduct between them (2 R 275, 303-304, 309-310, 317-318).

— At the conclusion of his investigations, Superintendent Espinosa recommended to the school district's Board of Trustees on or about April 3, 1996, that the employment contract of the teacher, Jose Gilberto Ramirez, be terminated. Espinosa also provided notice of this recommendation to Jose Gilberto Ramirez, as well as a directive for him to continue to stay away from the school district's property and facilities (2 R 275).

— Based upon Defendant Espinosa's recommendation, the school district's Board of Trustees terminated the employment of Jose Gilberto Ramirez on May 15, 1996. From the date the teacher was suspended with pay on January 29, 1996, until his termination, Jose Gilberto Ramirez was not at school or had any known contact with any student of the school district (2 R 276, 282).

At all times, when questioned by the school district's personnel, both the student, Melissa Martinez, and the teacher, Jose Gilberto Ramirez, denied any sexual relationship whatsoever (2 R 275, 303-304, 309-310, 317-318).

— In November of 1995, the student's father confronted the student about the teacher; and she did not tell her father that she'd been having sex with the teacher. When she was asked, she denied the relationship (2 R 309-310).

— The student never told her father that she had sex with the teacher, and she didn't tell her mother until February or March of 1996. When she told her mother, the teacher had already been suspended from his employment by Superintendent Espinosa (2 R 274, 311-313).

— Although the teacher did not threaten the student if she told about the relationship, she tried to hide the relationship from her parents. She was not truthful to her parents when she was asked about the relationship. When asked by other students about the affair, she denied the relationship (2 R 314).

— The student never told the teacher's wife, Appellee Janie Ramirez, that she was having sex with the teacher (2 R 315-316).

— When the student talked with the superintendent, Rodolfo Espinosa, and was asked by him if the teacher had done anything inappropriate to her, she denied it. Further she does not know of any individual who advised the superintendent that she was having sex with the teacher (2 R 317-318).

— As to the appropriateness of the superintendent's actions, the student stated that she knew that an investigation was done by the school, she was interviewed more than once as part of the investigation, but that she did not remember ever telling anyone at the school that she was having sex with the teacher. She knew that the superintendent had conferred with her father about the matter and knew that the teacher lost his job from the school over the relationship (2 R 319-320).

— The student admitted that she never did talk with Principal Jesse Maldonado about the teacher, never talked to any school board member and never told the band director, Mr. Ybarra, about the teacher's conduct (2 R 321-322).

— The student admitted that when asked by a friend (Rolando O.) whether or not she was having sex with the teacher, she again denied the relationship (2 R 323-324).

— The student related that she received poems from the teacher, but that she did not show them to her father or to any school official (2 R 326-327).

— When the student talked with High School Counselor Carmen Gallegos, Ms. Gallegos told her to tell the truth about the teacher, but she did not tell Ms. Gallegos that she was having a sexual relationship with the teacher (2 R 328-330).

ARGUMENT AND AUTHORITIES

I. The Court of Appeals properly affirmed the dismissal of Petitioners' claims against Jose Gilberto Ramirez in his official capacity.

Petitioners complain that the district court improperly sua sponte dismissed the official capacity claim against Jose Gilberto Ramirez. However, Petitioners have waived any right to complain of said dismissal, which arose out of the Report, Recommendation, and Order of the United States Magistrate Judge (4 R 774, 776-777). The district court accepted such recommendation, noting that Petitioners did not object to it (4 R 802). In that situation, no de novo review of said recommendation is required and the district court needed only to review it to determine if it was clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1) (1999), *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989). Further, appellate review

is limited to plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

The order accepting the magistrate's recommendation that the claims against the individuals in their official capacities be dismissed was signed on September 22, 1999 (4 R 802), the same day that the memorandum opinion granting Respondents' motion for summary judgment was signed (4 R 787-801). Both were filed on September 24, 1999 (4 R 787, 802). Petitioners' Motion to Reconsider Opinion and Order is silent as to the dismissal of the official capacity claim against Jose Gilberto Ramirez as is Petitioners' Notice of Appeal. *See* FED. R. APP. P. 3(c).

Having acquiesced in that dismissal, Petitioners should not be heard to complain about it on appeal.

In any event, Petitioners' suit against Respondents Rodolfo Espinosa, Janie Ramirez, and Jose Gilberto Ramirez in their official capacities was simply another method of pleading this case against the school district. "Actions for damage against a party in his official capacity are, in essence, actions against the governmental entity of which the officer is an agent." *Familias Unidas v. Briscoe*, 619 F.2d 391, 403 (5th Cir. 1980). As this Court has explained, "[o]fficial-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which the officer is an agent.' " *Kentucky v. Graham*, 473 U.S. 159, 165 (1985), quoting *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690 n.55 (1978). Therefore, in reality, the official capacity suit against these three individuals was merely another way to plead this suit against the Crystal City Independent School District, which was already a party.

Claims against these individuals "in [their] official capacity are redundant and unnecessary because any disputed issues that must be resolved in conjunction with the official capacity claims are the same as those requiring resolution in the claims against the school district." *Doe v. Rains Indep. Sch. Dist.*, 865 F. Supp. 375, 378 (E.D. Tex. 1994), *rev'd on other grounds*, 66 F.3d 1402 (5th Cir. 1995) and 76 F.3d 666 (5th Cir. 1996); citing *Doe v. Douglas County School District Re-1*, 775 F. Supp. 1414, 1416-17 (D. Colo. 1991). *See also Revontini v. Pasadena Indep. Sch. Dist.*, 981 F. Supp. 1013, 1021 n.14 (S.D. Tex. 1997) (dismissing claims against school officials in their official capacities because such claims are duplicative of claims against the school district). Because the claims against Rodolfo Espinosa, Janie Ramirez, and Jose Gilberto Ramirez, in their official capacities, were the same as the claims against Defendant Crystal City Independent School District, the claims were properly dismissed pursuant to Rule 12(b)(6). Suing public officials in their official capacities for acts performed within the scope of their authority, is equivalent to suing the school district. *See Kentucky*, 473 U.S. at 166; *Monell*, 436 U.S at 690 n.55 (1988). Therefore such claims were properly dismissed.

Petitioners further confuse their official capacity claims against Jose Gilberto Ramirez with their individual capacity claims. The latter have been severed out and are still pending in the district court (4 R 849). The dismissal of the official capacity claims was not to benefit him. It was simply to remove redundant complaints against the school district.

II. The Court of Appeals properly affirmed the dismissal of the official capacity claims against Janie Ramirez and Rodolfo Espinosa.

1. *Janie Ramirez*

Petitioners complain that Janie Ramirez was not entitled to a grant of qualified immunity. However, the district court did *not* grant her qualified immunity. She was not sued in her individual capacity, and the court's acceptance of the magistrate's recommendation that she, along with the other individuals sued, be dismissed in her official capacity completely resolved any claims against her (4 R 787, 795). Petitioners' discussion of Janie Ramirez' alleged role herein is entirely off point. Her liability in her individual capacity was never at issue, and therefore there was never any reason to consider her entitlement to qualified immunity, which is a presumption to be overcame by plaintiffs suing governmental employees in their individual capacities. *See Pfannistiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). There is no plain error in the district court's adoption of the magistrate judge's recommendation to dismiss those claims.

2. *Rodolfo Espinosa*

Qualified immunity shields government officials performing discretionary functions "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 638. When sued in their individual capacities, governmental employees are entitled to a presumption of qualified immunity from suit. *Id.* To overcome this presumption, Appellants have the burden to

prove that no reasonable official could have considered the conduct of the governmental official to be lawful, under the circumstances known to him at the time. *See Anderson*, 483 U.S. at 640-41. The reasonableness inquiry of the official's conduct is measured with reference to the law as it existed at the time of the conduct in question. *See King v. Chide*, 974 F.2d 653, 657 (5th Cir. 1992). "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." *Pfannstiel*, 918 F.2d at 1183.

In this case, qualified immunity for Superintendent Espinosa rests on whether reasonable government officials in the shoes of this superintendent would have known that any of his actions violated clearly established law. As there is no respondent superior or vicarious liability under 42 U.S.C. § 1983 (*Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 122 (1992); *Monell*, 436 U.S. at 691-94), the Plaintiff Melissa Martinez must show that Espinosa personally caused or participated in the deprivation of a federal right. *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987).

The summary judgment evidenced establishes that Superintendent Espinosa, as the superintendent of the school district, immediately began an investigation and took prompt remedial action when he first learned of the possibility of inappropriate conduct between the band director/teacher, Jose Gilberto Ramirez, and the Student Melissa Martinez. The summary judgment evidence conclusively established the reasonableness of actions taken by Espinosa based upon the information he was provided as the superintendent of the school district. He took prompt, appropriate remedial action and therefore, was entitled to qualified immunity against Plaintiff's claims.

Further, taking into account the information that was available to Superintendent Espinosa, and the information that was intentionally being withheld from the school district by Melissa Martinez and Jose Gilberto Ramirez, Espinosa took prompt, effective action and was not consciously indifferent to the rights of Plaintiff Melissa Martinez.

Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 456-58 (5th Cir. 1994), cited by the Appellants, is distinguishable. In *Doe* the Fifth Circuit concluded that a high school principal, although not the school superintendent, should be denied qualified immunity because there was summary judgment evidence that he received numerous reports of the teacher's inappropriate conduct with female students over the years and with the plaintiff specifically, that he regularly dismissed the reports and parents' complaints, that he did not record the incidents, and that he declined to discuss the reports with the school superintendent, the teacher, the student or her parents. 15 F.3d at 457. The school superintendent in *Doe* by contrast, was entitled to qualified immunity because the record showed he instructed the principal to speak with the teacher about reports of misconduct, personally investigated a related report, met with the teacher, reprimanded him, and warned him of the consequences of further misconduct. *Id.* at 458. By comparison, Espinosa's more extensive actions, (taking into account the information that was available to him at the time these events occurred) were not deliberately indifferent. Accordingly, Superintendent Espinosa was entitled to summary judgment based on qualified immunity.

III. The Court of Appeals properly affirmed summary judgment in favor of Crystal City Independent School District.

To hold the Crystal City Independent School District liable for actions of its employees under 42 U.S.C. § 1983, Petitioners must demonstrate, not merely allege, that her constitutional rights were violated through the execution of an official policy of the school district, which has been defined as follows:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [district] . . . or by an official to whom the [district] ha[s] delegated policy making authority; or
>
> 2. A persistent, widespread practice of [district] officials or employees which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [district] policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the district or to an official to whom that body has delegated policy making authority.

Eugene v. Alief Indep. Sch. Dist., 65 F.3d 1299, 1304 (5th Cir. 1995), *cert. denied*, 517 U.S. 1191 (1996).

The school district's policies, adopted by the Board of Trustees, expressly: (1) forbid school district personnel from fraternizing with students and engaging in sexual abuse of

students, (2) require investigation of all reports of sexual harassment or sexual abuse of students, and (3) provide students and parents a complaint process for any allegations of sexual harassment or sexual abuse by district personnel. (2 R 276, 283-289).

In an attempt to prove an unwritten policy inconsistent with the school district's official policy, Petitioners argue that the practice of allowing adult instructors to carry on affairs with minor student(s) was common in the Crystal City School District. However, the summary judgment evidence shows only that unsubstantiated charges of inappropriate conduct were made against four other employees of the school district. There is no indication whether criminal charges were ever filed against any of these individuals. Espinosa testified that one of the investigations was dropped when both parties denied the allegations; another apparently resulted in the teacher's resignation; and the other incidents are not discussed by Espinosa in enough detail to determine either the nature of the allegations or the outcome of the school district's investigation, if any. The mere existence of unproven allegations does not create a question of material fact that the school district had a custom, policy, or practice of violating any of its students' constitutional rights, or that it violated Melissa Martinez's constitutional rights.

Further, the district court was correct that Martinez' allegations against Espinosa are nothing more than rank hearsay. Declarations or affidavits submitted in conjunction with summary judgment proceedings must: (1) be based on personal knowledge, (2) state "facts as would be admissible in evidence" (*i.e.*, evidentiary facts, not conclusion); and (2) "show affirmatively that the affiant is competent to testify to the matters stated therein" (*i.e.*, no inadmissible hearsay

or opinions). FED. R. CIV. P. 56(e); *see also Williamson v. United States Dept. of Agriculture*, 815 F.2d 368, 383 (5th Cir. 1987). The proffered evidence did not meet this test.

Respondent School District was entitled to summary judgment that it was not liable under 42 U.S.C. § 1983, on Petitioner's failure to show that a policy or custom of the School District caused a violation of Melissa Martinez' constitutional rights.

CONCLUSION

For the reasons above stated Respondents respectfully ask this Honorable United States Supreme Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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